Office - Supreme Court, U.S.
FILED
FEB 5 1953
HAROLD B. WILEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 586

ROY A. H. KINSELY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit and
BRIEF IN SUPPORT THEREOF.

ROY H. LAUMEIER,
104½ Main Street,
Toledo, Ohio,

HARRY H. PETERSON,
515 Minnesota Federal Building,
Minneapolis, Minnesota,
Attorneys for Petitioner.

THE BYRD LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-0040

INDEX.

PETITION FOR WRIT OF CERTIORARI:

Opinion Below 1

Jurisdiction 2

Summary of Matters Involved 2

Questions Presented 6

Specifications of Errors to be Urged 7

Reasons for Granting Writ 8

BRIEF IN SUPPORT OF PETITION:

I. The Court of Appeals erred in holding that the prosecuting attorney was not guilty of misconduct in his closing argument by raising an issue as to petitioner's character and reputation since petitioner had no testimony relative to such question 11

II. The Court of Appeals erred in holding that the trial court did not err by refusing to give a specific instruction requiring the jury to find that the document produced at the trial as the one furnished governmental agents (Government's Exhibit 4), was the identical one furnished by petitioner to such agents 13

III. The Court of Appeals erred in holding that the trial court did not err in refusing to give an instruction that the indictment was not evidence of guilt and that the fact that the grand jury returned an indictment against petitioner should not influence the jury at all 16

IV. The Court of Appeals erred in holding that the trial court did not err in not accepting petitioner's offer of a stipulation that Government's Exhibit 4 contained numerous inaccurate and incorrect statements and accounts made by petitioner so as to make unnecessary the testimony of the women witnesses and to thus avoid the prejudice to petitioner resulting from the government's calling such women as witnesses 16

V. The Court of Appeals erred in holding that the trial court did not err holding that the offense of furnishing to agents of the Bureau of Internal Revenue a document containing false entries was a felony under U. S. C. Title 18, Section 1001 rather than a misdemeanor under U. S. C. Title 26, Section 3616 20

Conclusion 22

TABLE OF AUTHORITIES.

Cases.

Alexander v. State, 84 Texas Criminal Reports, 75, 204 S. W. 644 19

Baltimore National Bank v. State Tax Commission, 297 U. S. 209, 56 S. Ct. 417, 80 L. ed. 586 ..... 21, 22

Berkoff, Ex Parte, Dist. Minn., 65 Fed. Supp. 976 ..... 21, 22

Berkoff v. Humphrey, 8 Cir., 159 Fed. (2) 5 21

Bird v. United States, 180 U. S. 356, 215 S. Ct. 403, 45 L. ed. 570 15

Chicago & N. W. Ry. Co. v. Kelly, 8 Cir., 84 Fed. (2d) 568 13

Cohen v. Gould, 177 Minn. 398, 225 N. W. 436 21

Cohen, Ex Parte, 9 Cir., 191 Fed. (2d) 300 21

Cooper v. United States, 8 Cir., 9 Fed. (2d) 216, 226 16

Hendry v. United States, 6 Cir., 233 Fed. 5 (16) 15

Kellar v. State, 192 Ind. 38, 134 N. E. 881 16

Kepner v. United States, 195 U. S. 100, 125 21

McKnight v. United States, 97 Fed. 208, 38 C. C. A. 115 ..... 8, 12

State v. Creighton, 330 Mo. 1176, 52 S. W. (2d) 556 19

Sunderland v. United States, 19 Fed. (2d) 202, 216 18

Texts.

50 *Am. Jurisprudence*, Stipulations, Sections 2, 9 ... 19
53 *Am. Jurisprudence*, Trial, Section 627 ... 15
91 *A. L. R.* 1478 ... 20
1 *Bishop Proc.*, Section 1119 ... 12
23 *C. J. S.*, Criminal Law, Section 960 ... 19
60 *C. J.*, pp. 39, 65-66 ... 19
1 *Wigmore*, Evidence, Section 57 ... 13, 17

Statutes.

18 U. S. C., Title 18, Section 1001 ... 1, 2, 5, 8, 10, 20, 21
26 U. S. C., Title 26, Section 3615 ... 10
26 U. S. C., Title 26, Section 3616 ... 5, 8, 10, 20, 21
28 U. S. C., Title 28, Section 1254(1) ... 2

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

ROY A. H. KNISELY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Your petitioner, Roy A. H. Knisely, respectfully petitions your Honorable Court that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above cause on the 18th day of December, 1952, affirming a judgment of the United States District Court for the Northern District of Ohio, Western Division, convicting your petitioner of a violation of Section 1001 of Title 18 U. S. C.—furnishing to officials of the Bureau of Internal Revenue a document of false entries; and also to review an order of said Court filed on January 12, 1953 denying petitioner's petition for a re-hearing.

OPINION BELOW.

The Circuit Court of Appeals did not write a memorandum opinion. Its order of judgment appears in the Record at page 249, and the Order denying Petition for Rehearing appears at Record page 257.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 18, 1952 and the order denying the petition for re-hearing was filed on January 12, 1953. Jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 U. S. C. A.

SUMMARY OF MATTERS INVOLVED.

Petitioner was indicted in the United States District Court for the Northern District of Ohio, Western Division, on March 14, 1952 for allegedly submitting to the agents of the Bureau of Internal Revenue of the United States an account book containing fifty-five false and fictitious entries as to the amounts, petitioner, a physician and surgeon, charged as many different women for professional services rendered by him to them, and violation of Section 1001 of Title 18 U. S. C.

The indictment contained fifty-five Counts. Upon motion of petitioner the District Court held that the indictment stated but one offense of which each of the Counts was but a particular.

Petitioner made several motions before entering a plea. He moved to suppress certain evidence obtained by the government upon the grounds that governmental agents had wrongfully entered petitioner's office and taken therefrom his 1947 Account and Appointment Book and at the same time taken certain photographs of the interior of his office and that by means of the information contained in said Appointment Book and said photographs obtained the evidence upon which the indictment was based; and also moved to quash the indictment upon the grounds that it was based upon evidence illegally and unconstitutionally obtained by governmental agents in violation of the

Fourth and Fifth Amendments to the Constitution. These motions were denied.

The prosecuting attorney indicated at the opening of the trial that the government's evidence would consist of the testimony of agents of the Bureau of Internal Revenue and the local Collectors Office to the effect that a certain book marked Government's Exhibit 4 contained the entries in question; that the book had been furnished to the agents of the Bureau of Internal Revenue by petitioner; and that the testimony of the fifty-five women mentioned in the fifty-five Counts of the indictment would show that the entries made in said book as to the amounts which petitioner received from each of said women for professional services were false.

Petitioner contended that Government's Exhibit 4 was not his Account Book but rather a book that he made up from memory and by the use of his income tax returns and other data in his office which was correct as to the aggregate amount of his income but incorrect as to many particular items.

At the opening of the trial, petitioner, through his counsel, offered to stipulate that Government's Exhibit 4 did in fact contain numerous inaccurate and incorrect statements and accounts made by petitioner upon the condition that the government should not introduce the oral testimony of the women in question as to the amounts received from them respectively. Petitioner's counsel stated that the purpose of such offer was to establish by stipulation the only ultimate facts as to which the testimony of such women was material, and at the same time avoid the prejudice to petitioner which was bound to result from calling the women as witnesses. The prosecuting attorney refused to accept such stipulation. The Court refused to accept the stipulation and permitted the government to call the women to establish the facts.

Petitioner testified that the Account and Appointment Book which he furnished to the governmental agents on March 15, 1949 was a book in which he made the original entries from day to day as the services were rendered by him to his patients; that on March 14, 1949, the governmental agents thumbed through the book and gave it back to petitioner without copying any of the entries. That thereafter and sometime later in November, 1949, petitioner discovered that his office had been entered by someone who used a key for the purpose and had taken therefrom his 1947 Account and Appointment Book and certain office records which petitioner kept. Petitioner then prepared Government's Exhibit 4. This book originally was printed as an Account and Appointment Book for 1946. Petitioner changed it so as to make it usable for 1947 and pasted a 1947 label on the cover thereof. On or about December 6, 1949, agents of the government procured this book from petitioner. At the trial governmental agents testified that this book was the same one which petitioner had submitted to them on March 14, 1949. Petitioner testified that it was not the same book but a different one which he prepared as stated. He further testified that at the time he gave the book to the government agents he told them what the facts were and that the book was not accurate. His testimony on this point was as follows (R. p. 135):

> "Q. Tell the Court and jury what conversation you and Mr. Penny had. A. Well, Mr. Penny, he says, 'Have you got the books?' I said, 'Yes, sir, I have the books. But, Mr. Penny,' I says, 'I want you to understand,' I says, 'now, this book I am giving you for 1947', I says, 'is a book,'—I says, 'This is not the original book.' I says, 'Some time previous to—a few days ago; I don't know when,' I says, 'somebody, or some persons, or somebody unknown,' I says, 'has stolen my 1947 book.' I says, 'This book here that I am giving

you is a book that was made up. This book is not accurate. This book,—the amounts in this book was made up from memory, and you will find that the summation of this book is from my income tax,—where I got that was from my copy of my 1947 income tax record.' I knew the net, and I knew my deductions."

During the trial fifty-five women were called to testify as to various amounts which they claim they paid petitioner for professional services, which amounts differed from those entered in the book in question.

This was all over petitioner's objection.

Petitioner contended that the facts alleged in the indictment did not constitute an offense under U. S. C. Title 18, Section 1001, and that if any offense was stated it was one under U. S. C. Title 26, Section 3616. At the close of the testimony petitioner requested the Trial Court to instruct the jury: (1) That an indictment is not evidence of guilt and the fact that the Grand Jury returned an indictment against the petitioner should not influence the jury at all, and (2) that in order to convict the petitioner the jury must find that Government's Exhibit 4 was the identical book which petitioner furnished to the governmental agents on March 14, 1949 and not the copy of the original which petitioner claimed it was.

Petitioner contended in support of the second instruction mentioned that this was important for the reason that the alleged false entries related entirely to Government's Exhibit 4 with the consequence that if said Exhibit was a copy and not the original there was no proof that the book furnished to the government contained any false entries thereof.

Petitioner did not offer any testimony as to his good character and reputation. The prosecuting attorney in his closing argument to the jury raised the point as to the peti-

tioner's past reputation and thus brought to the attention of the jury the fact that petitioner had not called any witnesses to testify concerning his character and reputation.

The petitioner contends that by reason of the premises aforesaid, he was denied a fair and adequate trial.

QUESTIONS PRESENTED.

The following are the primary questions presented by this petition:

(1) Is it prejudicial misconduct on the part of the prosecuting attorney to raise in his final closing argument an issue as to the petitioner's reputation and character, where petitioner has not raised such an issue?

(2) In a criminal prosecution for furnishing governmental agents a document containing false and fictitious entries and accounts, where the government's evidence was to the effect that such a document was furnished to such agents by petitioner and the petitioner's evidence was to the effect that another and different document was furnished by petitioner with a statement at the time that it contained such entries, is the petitioner entitled to a specific instruction stating the respective claims of the parties and that the jury should find whether the document in evidence was the identical one furnished by petitioner and, if so, whether petitioner made such statement concerning the document to such agents?

(3) Is the petitioner in a criminal case entitled to an instruction that "an indictment is not evidence of guilt and the fact that the Grand Jury has returned an indictment against the defendant should not influence the jury at all," where the lower court gives an instruction that the petitioner is presumed to be innocent irrespective of the fact that an indictment has been relieved against him until his

guilt is proved beyond a reasonable doubt and the burden of so proving the allegations of the indictment is upon prosecution?

(4) Should the court in a criminal case accept the petitioner's offer in open court to stipulate certain facts without oral testimony to prove the same, where the witnesses' testimony with respect thereto would only establish the facts embraced the offer to stipulate and the inevitable and certain effect of their testimony would be to create a prejudicial inference of numerous other offenses involving moral turpitude having no materiality or relevancy?

(5) Does a specific statute relating to a certain type of act in a certain situation control over a general statute relating generally to such acts?

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that the prosecuting attorney was not guilty of misconduct in his closing argument by raising an issue as to petitioner's character and reputation since petitioner had no testimony relative to such question;

(2) In holding that the trial court did not err by refusing to give a specific instruction requiring the jury to find that the document produced at the trial as the one furnished governmental agents (Government's Exhibit 4), was the identical one furnished by petitioner to such agents;

(3) In holding that the trial court did not err in refusing to give an instruction that the indictment was not evidence of guilt and that the fact that the Grand Jury returned an indictment against petitioner should not influence the jury at all;

(4) In holding that the trial court did not err in not accepting petitioner's offer of a stipulation that Government's Exhibit 4 contained numerous inaccurate and incorrect statements and accounts made by petitioner so as to make unnecessary the testimony of the women witnesses and to thus avoid the prejudice to petitioner resulting from the government's calling such women as witnesses; and

(5) In holding that the trial court did not err holding that the offense of furnishing to agents of the Bureau of Internal Revenue a document containing false entries was a felony under U. S. C. Title 18, Section 1001 rather than a misdemeanor under U. S. C. Title 26, Section 3616.

REASONS FOR GRANTING WRIT.

The Circuit Court of Appeals fell into serious error respecting important and far-reaching principles of law as follows:

In holding:

(1) That the prosecuting attorney was not guilty of misconduct. In the supporting brief we point out that it is the accused's privilege and his duty to put in issue his character and reputation; that where the accused does not put his character and reputation in issue, he can rest upon the legal presumption of good character; and that where the prosecuting attorney in such a case injects the issue of the accused's reputation and character into the case it not only deprives the accused of his legal right not to have that done but also deprives the accused of the legal presumption in his favor of good character and good reputation. This rule is nowhere better stated and discussed than in a decision of the court below in *McKnight v. United States*, 97 Fed. 208, 38 C. C. A. 115. The court which decided the *McKnight* case was composed of Judges Day, Taft and Lurton;

(2) That the jury should have been required by an explicit instruction to find that the document which the government claimed was furnished by petitioner to the agents of the Bureau of Internal Revenue (Government's Exhibit 4), was the *identical* one which petitioner furnished to such agents on March 14, 1949. This was of the utmost importance for the reason that the jury should have been brought to grips with the controlling issue in the case and that was whether petitioner furnished a book admittedly correct to the governmental agents or one which he admitted contained false entries. Under the circumstances of the case it was important that the jury should have been instructed to decide that precise question for the reason that prejudice had been generated against petitioner by the other testimony in the case which had a tendency to becloud all other issues. The reasons in support of this proposition are cited in the supporting brief;

(3) That the trial court did not err in refusing to give an instruction that the indictment was not evidence of guilt and that the fact that the Grand Jury had indicted the petitioner should not influence the jury at all for the reason that such an instruction is necessary in order that a jury understand that it should try the case exclusively upon the evidence received in court and that an indictment is nothing more than an accusation which possesses no evidentiary qualities;

(4) That it is fundamental that the petitioner in a criminal case should have a fair and impartial trial; that evidence is produced to prove facts; that where the evidence of the facts necessarily creates prejudice against the petitioner and where those facts can be established by stipulation without the creation of such prejudice, the court in order to accord to the accused his legal right to a fair trial should eliminate the prejudice by accepting the

stipulation. Thereby, every purpose of taking the evidence would be accomplished and at the same time the prejudice against the accused would be avoided. This should always be done in order to administer the criminal law fairly and justly; and

(5) That furnishing a document containing false and fictitious accounts and entries to a collector or deputy in an income tax case is an offense under U. S. C. Title 18, Section 1001 for the reason that it is made a specific offense under U. S. C. Title 26, Section 3616. The well settled principle is that a specific statute governs and controls as against a general one. The Congress has seen fit to make the offense in question a specific one under Section 3615. This would indicate that it did not intend that it should also be an offense under Section 1001. The former is a misdemeanor and the latter is a felony.

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari be granted.

ROY H. LAMBERT,
104½ Main Street,
Toledo, Ohio,

HARRY H. PETERSON,
515 Minnesota Federal Building,
Minneapolis, Minnesota,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

ROY A. H. KNISELY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Court of Appeals erred in holding that the prosecuting attorney was not guilty of misconduct in his closing argument by raising an issue as to petitioner's character and reputation since petitioner had no testimony relative to such question.

The prosecuting attorney committed prejudicial error in raising an issue in his final closing argument as to the "past reputation" of defendant. (R. p. 215.) He persisted after timely objection by defendant and went on to say:

> "Every time a man comes into this court there is talk about the fact that he was an honest member of the community. I will say to you that more in income tax fraud cases than in any others,—"

(R. p. 215), when there was another objection.

It is the defendant's privilege to tender an issue as to his character and reputation. He may rest upon the presumption of good character and reputation. The prosecu-

tion invades that right when it raises an issue of defendant's character and reputation, where defendant himself has not done so and thereby violates the defendant's legal rights of keeping the issue of his character and reputation out of the case and of having the benefit of the presumption that he is of good character and reputation. This Court so held in the leading case of *McKnight v. United States,* 97 Fed. 208, 38 C. C. A. 115, where it said:

> "Where no testimony (as to character and reputation) is offered, the accused can rest upon the legal presumption of good character."
>
> "To permit such a course (comment by prosecutor that defendant did not produce evidence as to character and reputation) of proceeding would be to deprive the accused of the legal presumption in his favor."
>
> "The rule is well stated in 1 Bish. Cr. Proc. Section 1119:
>
> 'It is the defendant's privilege, not his duty, to open by evidence the question of his character. The expense, the remoteness of witnesses, confidence in his case, and other considerations would often dissuade him therefrom however certain of success therein. Hence, and because the state may not show a character bad which the defendant has not put in issue, the omission of this evidence does not justify the presumption that it is not good; and neither counsel nor the judge has the right to argue to the jury that it does, nor should they assume anything against it while deliberating on their verdict.' "

The *McKnight* case was decided by a court composed of three great judges—Day, who wrote the opinion, Lurton and Taft, all of whom later became justices of the Supreme Court of the United States. Judge Taft not only became a justice of the Supreme Court but also the Chief Justice thereof and prior thereto president of the United States.

The prosecutor not only raised an issue, which he had no right to do and which clearly violated defendant's legal rights in a prejudicial manner, but also did so in such a way as to direct the jury's attention to the fact that defendant had not produced any character testimony. Under the circumstances—the parade of some 46 witnesses from whose testimony an inference must have been made that defendant was an abortionist—the inference was certainly drawn by the jury that defendant was a bad man and should be convicted as Wigmore said (1 *Wigmore, Ev.*, Section 57), simply because he was a bad man, regardless of what the evidence in the case proved.

It is always remembered that remarks made by counsel at such a time as those here complained of cannot be answered and hence are peculiarly prejudicial. See, *Chicago & N. W. Ry. Co. v. Kelly*, 8 Cir., 84 Fed. (2d) 568 (per John B. Sanborn, Circuit Judge). Under the rule defendant is entitled to a new trial because of the prosecuting attorney's comments in his closing argument.

II.

The Court of Appeals erred in holding that the trial court did not err by refusing to give a specific instruction requiring the jury to find that the document produced at the trial as the one furnished governmental agents (Government's Exhibit 4), was the identical one furnished by petitioner to such agents.

The trial court should have given the requested instruction. (R. p. 225.) The theories of the government and of the defense made such an instruction necessary to bring the jury to grips with the real issue of the case. The government's theory was that on March 15, 1949 defendant furnished his account book (Appointments Book for 1947) to the governmental agents without any comment

as to its truthfulness and accuracy thereby in effect that it was a true and accurate account book. Defendant's theory was that he had two account books (Appointment Books); that one was printed and prepared for the year 1947, which he kept in due course and which had been taken from his office some time between March 15, 1949 (after he had furnished it to the governmental agents) and November 1949; that this book was the one he furnished to the governmental agents in March 1949; that after this book had been taken from his office he prepared from memory another book (Appointments Book for 1947), which was marked Exhibit 4; that this book had been printed and prepared for use during the year 1946; that defendant changed it, including the markings on the cover, so it could be used during 1947; that he entered therein from memory and by use of memoranda the names of his patients and the amounts therein set forth as the fees for services rendered them; and that he told the government agents in December 1949 when he turned it over to them the facts concerning the manner in which it was prepared. (R. pp. 135-137.)

If the jury accepted the government's version as to the identity of the book, then it undoubtedly found that defendant made no explanation negativing fraud; but, if it accepted defendant's version, then a different book from Exhibit 4 was furnished to the governmental agents in March 1949—one that was not shown to have contained false and fictitious accounts and entries. Also, no intent to deceive could be attributed to defendant in December 1949 because of the explanation he then made as to the character of Exhibit 4. That there were two books can hardly be denied in view of the fact that defendant kept his accounts in Appointments Book furnished to him gratis each year, by a drug firm (R. pp. 136-137) and that de-

fendant's other record books were all kept in books printed and prepared for the particular year in which they were used and Exhibit B was changed from 1946 to 1947.

In such a situation it was of paramount importance to have the jury definitely pass on the question of the identity of the book furnished in March, 1949 to the governmental agents. The applicable rule is well stated in 53 *American Jurisprudence,* Trial, Section 627:

> "In criminal cases it is the duty of the court to charge on every issue or theory having any support in the evidence. The instructions should distinctly set forth the law applicable not only to the case as made by the evidence for the prosecution, but also to the case as made by all the evidence, and especially to any favorable evidence comprising defensive matter in behalf of the accused. * * *"

In *Bird v. United States,* 180 U. S. 356, 21 St. Ct. 403, 45 L. ed. 570, in reversing a conviction for murder, the court said:

> "It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. * * * The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved."

Here, the general charge left the precise question controlling decision open and failed to bring it to the jury's attention for consideration and a finding. Therefore, the submission was entirely inadequate and prejudicial to defendant. The error requires a new trial. *Hendry v. United States,* 6 Cir., 233 Fed. 5 (16).

III.

The Court of Appeals erred in holding that the trial court did not err in refusing to give an instruction that the indictment was not evidence of guilt and that the fact that the grand jury returned an indictment against petitioner should not influence the jury at all.

The defendant is always entitled to an instruction, when one is requested, that the indictment is not evidence of guilt.

Cooper v. United States, 8 Cir., 9 Fed. (2d) 216, 226.

The defendant is entitled to such an instruction even though, as here the court has given an instruction that the defendant is presumed to be innocent notwithstanding the indictment.

Kellar v. State, 192 Ind. 38, 134 N. E. 881.

Under the authorities cited the failure to give the instruction here requested is reversible error.

IV.

The Court of Appeals erred in holding that the trial court did not err in not accepting petitioner's offer of a stipulation that Government's Exhibit 4 contained numerous inaccurate and incorrect statements and accounts made by petitioner so as to make unnecessary the testimony of the women witnesses and to thus avoid the prejudice to petitioner resulting from the government's calling such women as witnesses.

It was error to refuse the stipulation offered by defendant. The numerous women and the men, other than the government agents, all testified to the fact that payments were made to defendant for professional services rendered to such women or the wives of such men and the

amounts paid for the services. The names of all these women were entered in the "1947 Appointments Book," Exhibit 4, and an amount was entered for each one as the fee paid. In each case, except one or two, the testimony showed that the women had received only one professional treatment from defendant at his office and that fee was $100, except as otherwise stated in statement of facts. The sole legal purpose of the testimony was to show that the amounts entered in defendant's book for such services were false and fictitious. The purpose of stipulation was to admit such fact without such testimony and to avoid the inference that defendant committed as many abortions as there were women. After all, he was on trial for furnishing a false and fictitious document to a governmental agent and not for abortion. It was therefore necessary in order to secure a fair and impartial trial of the charge against defendant that evidence of abortions or inferences thereof be excluded. It was plain that a parade of 46 witnesses, 43 of whom were women, giving such testimony, would certainly and inevitably create the inference that defendant was an abortionist. Under such circumstances there was danger that the jury would be prejudiced in considering the charge against him.

It is plain that the prosecuting attorney insisted on parading the 46 witnesses of the government not to prove what defendant offered to stipulate, but rather to prejudice him by the inference such a parade would create that defendant was an abortionist—a bad man, who should be convicted on general principles. (R. pp. 52-53.)

It is no answer to say that the jury was instructed to find him guilty or not guilty of the crime of which he stood charged. It has been said that a jury cannot help being influenced by proofs of other crimes, even though such proof is not relevant or material to the one charged. As Wigmore says (1 *Wigmore, Ev.*, Section 57):

> "This policy of the Anglo-American law is perhaps more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play—an instinct which asserts itself in other departments of our trial law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot help operating with any jury, in or out of court * * *. Our rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."

The administration of justice is no mere mechanical performance. Always the proceedings should be so controlled and conducted as to secure the defendant a fair and impartial trial. The highest function of, and indeed the greatest challenge to, a trial judge is in accomplishing just such a result. As Circuit Judge Booth said in *Sunderland v. United States,* 19 Fed. (2d) 202, 216:

> "It consists not only in an observance of the naked forms of law, but in recognition and just appreciation of its principles. * * * It means a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. * * * Being impartial means being indifferent as between the parties. * * * It means that the acts and language of the prosecuting attorney are subject to control; that his duty consists not in securing conviction at all hazards, but in ascertaining the truth. * * * It means that the defendant shall have a fair opportunity through his counsel to outline his defense to the jury. It means that the right of cross-examination shall be respected. * * * It means that, while the judge may exercise his right to comment on the evidence, yet he may not extend

his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror."

23 *C. J. S.*, Criminal Law, Sec. 960.

Stipulations, being conclusive as to facts stipulated and in the nature of special verdicts, are favored in the law. A fact admitted should never be proved.

50 *Am. Jur.*, Stipulations, Sections 2, 9;
60 *C. J.*, pp. 39, 65-66.

A trial court should in a criminal case accept an offer by defendant of a stipulation as to the existence of a fact in lieu of testimony to establish such fact and its refusal to do so, if prejudicial, is reversible error.

State v. Creighton, 330 Mo. 1176, 52 S. W. (2d) 556;
Alexander v. State, 84 Tex. Crim. Rep. 75, 204 S. W. 644.

In the *Creighton* case, *supra,* counsel for accused announced that the latter would not deny that he committed the homicide with a particular revolver which the state sought to prove that he had taken at another place from the chief of police, who had tried to arrest him for a bank robbery, and such chief was permitted to testify to an admission by accused that he was present when the revolver was taken. The state having argued that it could not safely assume that accused would admit the killing at the time and place alleged, with the weapon under discussion, the court said:

"It would have been competent to prove appellant's prior possession of the revolver if it had tended to connect him with the homicide and the fact were in issue. * * * But, in view of his counsel's announcement that the fact was not in issue, we think the evidence was improper, although the admission was not

made in the presence of the jury. The state could have demanded that, if the fact had been denied. Since the state had proof of an admission by appellant that he was wanted at Hastings for bank robbery, and killed to avoid arrest, evidence corroborative thereof would not have been competent, but it was unnecessary to show the revolver was taken away from the chief of police while he was attempting to arrest the appellant."

In cases where the stipulation does not include all facts which might be established by the testimony, that court may and should decline to accept it. These cases are collected in an annotation in 91 *A. L. R.* 1478.

Here the stipulation embraced every fact which the witnesses in question were called to establish by their testimony. Their testimony served no purpose under the circumstances except to prejudice defendant. Hence, the court erred in not accepting the stipulation.

V.

The Court of Appeals erred in holding that the trial court did not err holding that the offense of furnishing to agents of the Bureau of Internal Revenue a document containing false entries was a felony under U. S. C. Title 18, Section 1001 rather than a misdemeanor under U. S. C. Title 26, Section 3616.

It stands undisputed that furnishing a document containing false and fictitious accounts and entries is criminal under U. S. C. Title 26, Section 3616, when the document is furnished to a collector or deputy in an income tax case, and under U. S. C. Title 18, Sec. 1001 when it is furnished to any other governmental agency or officer with respect to a matter within its or his jurisdiction. Section 3616 declares such offenses to be misdemeanors and Section 1001 declares them to be felonies. It is incongruous to de-

clare by different statutes that an act is both a felony and misdemeanor. Such could not have been the legislative (here Congressional) intent. In such cases the courts hold that effect will be given to the legislative intent by holding that the specific statute applies only in the field to which it relates and that the general statute applies to all other matters not embraced within the terms of the specific statute.

Baltimore Nat. Bank v. State Tax Commission, 297 U. S. 209, 56 S. Ct. 417, 80 L. ed. 586;
Cohen v. Gould, 177 Minn. 398, 225 N. W. 435.

As said in the *Baltimore Nat. Bank* case, *supra* (297 U. S. 215), quoting from *Kepner v. United States,* 195 U. S. 100, 125:

> "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or other statute which might otherwise prove controlling."

So here, Sec. 3616 controls in income tax cases because it specifically relates to income tax cases. Sec. 1001 applies generally to cases other than those involving income tax cases. Hence, the court should have held that the crime charged here was a misdemeanor. In that view, it erred in denying defendant's motion in arrest of judgment.

We feel bound to call attention to some cases, which seem to be *contra,* viz.:

Ex parte Cohen, 9 Cir., 191 Fed. (2d) 300;
Ex Parte Berkoff, Dist. Minn., 65 Fed. Supp. 976;
Aff'd. Berkoff v. Humphrey, 8 Cir., 159 Fed. (2) 5.

Neither case is in point. The *Cohen* and *Berkoff* cases involved the question whether Section 3616 as a later statute impliedly repealed Section 1001, not whether each

should be construed as intended to apply to a specific field. Thus, neither considered or decided the question raised here. Furthermore, the *Berkoff* case is weakened as an authority by the fact that the Court of Appeals decided the appeal upon other grounds, refusing to pass upon the question of implied repeal. In any event the result reached in those cases is unsound because it runs counter to well settled rules of construction stated in the *Baltimore Nat. Bank* case, *supra*.

CONCLUSION.

Petitioner deems the questions which he seeks to raise on Certiorari to be important not only to him, but also to the bench, bar, and public. He earnestly contends that the decisions below denied him fundamental legal rights and that, if the decisions in the trial court on any one of the first four questions had been in his favor he most likely would have been acquitted rather than convicted. If decision of the fifth question had been in his favor, he would in any view of the case at most have been convicted only of a misdemeanor rather than a felony. The writ should issue to correct the errors mentioned and thus accord to petitioner rights secured to him by law, but which were denied to him below.

Respectfully submitted,

ROY H. LAMBERT, ESQ.,
104½ Main Street,
Toledo, Ohio,

HARRY H. PETERSON, ESQ.,
515 Minnesota Federal Building,
Minneapolis, 2, Minnesota,
Attorneys for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and rule involved	3
Statement	5
Argument	10
Conclusion	19

CITATIONS

CASES:

Baker v. *United States*, 115 F. 2d 533, certiorari denied, 312 U.S. 692 — 13
Berkoff, Ex parte, 65 F. Supp. 976, affirmed *sub nom.* *Berkoff* v. *Humphrey*, 159 F. 2d 5 — 17
Capone v. *United States*, 51 F. 2d 609, certiorari denied, 284 U.S. 669 — 18
Cohen, Ex parte, 191 F. 2d 300 — 17
Cohen v. *United States*, 192 F. 2d 933, certiorari denied, 342 U.S. 947 — 17
Cohen v. *United States*, decided January 6, 1953 — 17
Gaunt v. *United States*, 184 F. 2d 284 — 18
Greer v. *United States*, 245 U.S. 559 — 12
Michelson v. *United States*, 335 U.S. 469 — 12
Ochoa v. *United States*, 167 F. 2d 341 — 13
Springer v. *United States*, 148 F. 2d 411 — 13
United States v. *Beacon Brass Co.*, 344 U.S. 43 — 18
United States v. *Borden Co.*, 308 U.S. 188 — 18
United States v. *DeVasto*, 52 F. 2d 26, certiorari denied, 284 U.S. 678 — 13
United States v. *Gilliland*, 312 U.S. 86 — 18
United States v. *Heine*, 149 F. 2d 485, certiorari denied, 325 U.S. 885 — 18
United States v. *Noveck*, 273 U.S. 202 — 18
United States v. *Tommasello*, 160 F. 2d 348 — 18
United States v. *Wernecke*, 138 F. 2d 561, certiorari denied, 321 U.S. 771 — 13

STATUTES:

Internal Revenue Code:
Sec. 3616 (26 U.S.C. 1946 ed., Sec. 3616) — 3, 16
18 U.S.C., Sec. 1001 — 3, 16, 18

MISCELLANEOUS:

Federal Rules of Criminal Procedure, Rule 30 — 4, 14
Reorganization Plan No. 1 of 1952, 17 Fed. Reg. 2243 — 17

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 586

ROY A. H. KNISELY, *Petitioner*

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Appeals did not write an opinion. The *per curiam* order (R. 249) affirming the judgment of conviction is reported at 200 F. 2d 559.

JURISDICTION

The judgment of the Court of Appeals was entered on December 18, 1952 (R. 249), and the peti-

tion for rehearing was denied on January 12, 1953 (R. 257). The petition for a writ of certiorari was filed on February 5, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). See also Rules 37 (b)(2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the prosecuting attorney was guilty of prejudicial misconduct when, in answering the defense argument that petitioner was an honest man, he began by saying that he would now refer to petitioner's "past reputation."

2. Whether petitioner was entitled to a specific instruction, requested orally at the conclusion of the court's charge, requiring the jury to find that the document produced at the trial was the identical one given by petitioner to the Government agents.

3. Whether petitioner was entitled to a specific requested instruction that the indictment should not be regarded as evidence.

4. Whether the district court should have required the prosecutor to accept a proposed stipulation of facts, when the prosecutor stated that part of the alleged facts were contradicted by evidence in his possession.

5. Whether the offense of furnishing a false statement to special agents of the Intelligence Unit

of the Bureau of Internal Revenue constitutes a misdemeanor under Section 3616, Internal Revenue Code, instead of a felony under 18 U.S.C. 1001.

STATUTES AND RULE INVOLVED

18 U.S.C.:

> SEC. 1001. STATEMENTS OR ENTRIES GENERALLY.
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Internal Revenue Code:

> SEC. 3616. PENALTIES.
>
> Whenever any person—
>
> (a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or,

(b) *Neglect to Obey Summons.*—Being duly summoned to appear to testify, or to appear and produce books as required under section 3615, neglects to appear or to produce said books—

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3616.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his ob-

jection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On February 29, 1952, an indictment in 55 counts was returned against petitioner in the United States District Court for the Northern District of Ohio charging him with submitting false records to Government agents, in violation of 18 U.S.C. 1001. A preliminary paragraph to the first count alleged that on March 14, 1949, petitioner knowingly submitted to duly authorized agents of the Bureau of Internal Revenue, who were investigating his income tax return for 1947, certain false records of fees received from patients during that year. The second paragraph of the first count alleged specifically that the records were false in that they purported to show that petitioner, a doctor, had on July 30, 1947, received a fee of $2 from Mrs. Marie Abrass, whereas the fee was actually $100. (R. 3-4.) The other 54 counts incorporated the preliminary paragraph of the first count, and then alleged similar specific instances in which the records of fees received had been falsified. (R. 4-24.) Upon motion by petitioner (R. 33), and with the consent of the Government (R. 45), the entire indictment was reduced to one count and the specific allegations of falsity were treated as a bill of particulars (R. 44-46). Following a jury trial, petitioner was convicted (R. 2, 235) and on May 1, 1952, he was sentenced to imprisonment for a term

of three years and fined $5,000 (R. 2, 238-241). On appeal, the judgment was affirmed by a brief *per curiam* order (R. 249).

On the morning the trial began, and before the jury had been chosen (R. 53), counsel for petitioner offered the following stipulation (R. 51):

> * * * that the Government shall not introduce any oral testimony to prove that defendant's account book for the year 1947, which he delivered to the agents of the Government in December, 1949, and which has been photostated by such agents, contains false and fictitious statements and accounts; that said book contains numerous inaccurate and incorrect statements and accounts made by the defendant; that the defendant did, at the time the defendant delivered said book to the Government agents, tell them that such book contained entries made by him during 1949 from memory and from memos, after his account book for 1947, in which he made daily entries of his business had been stolen from his office, and that the book in question contained many inaccuracies except as to the total amount of his income for the year 1947.

Counsel stated that the purpose of the stipulation was to settle the facts as to the account book, and to avoid a parade of women witnesses which might

be prejudicial to petitioner.[1] (R. 51.) Counsel for the Government replied that his evidence was that when petitioner delivered the book to the agents he stated that it was his original account book for 1947; that petitioner had repeatedly so stated; that he had never heard a suggestion to the contrary until that morning; and that, while he would be willing to stipulate as to the testimony of the women, he could not agree to the rest of the proposal. Counsel for petitioner refused to accept this suggested compromise. (R. 52-53.)

The evidence to support the verdict may briefly be summarized as follows:

Kenneth M. Cannon testified that he was a Special Agent with the Intelligence Unit of the Bureau of Internal Revenue; that he was directly subordinate to the Commissioner of Internal Revenue in Washington, D. C.; and that he was in no way subordinate to the local Collector of Internal Revenue. (R. 55.) In the course of his duties he examined petitioner's income tax return for 1947 and conferred with him on March 14, 1949. (R. 55-56.) During the conference petitioner presented his account book for 1947 and the agent examined it, made a mental note of several items and identi-

---

[1] In the petition for certiorari the following explanation is given (p. 17):

> The purpose of stipulation was to admit such fact [fictitious entries] without such testimony and to avoid the inference that defendant committed as many abortions as there were women.

fying marks,[2] and then returned it. (R. 56, 58, 61-62, 63, 66, 119-121.) The entire conference lasted from an hour to two hours. (R. 66.) On December 7, 1949, Special Agent Penny, acting under Cannon's instructions, brought the account book to him. (R. 57.) He looked it over again, assured himself by the identifying marks that it was the same book he had examined in March, and then sent it to be photostated. (R. 57.) He identified the photostat (R. 57) and later identified the original book (R. 117-121).

Thirty-eight women testified that they had received medical treatment from petitioner during 1947, and eleven men testified that they had taken their wives to him for treatment during that year. The fee in most cases was $100. Almost all payments were cash and no receipts were given. (R. 68-110.) One woman, who testified that she had paid a fee of $100, stated that after the investigation began petitioner suggested that she tell the agents the fee had been $10. (R. 79.)

Special Agent Blaine Penny testified that, pursuant to a telephone appointment made a day or so previously, he called at petitioner's office on December 7, 1949, and asked for the 1947 account

---

[2] These identifying marks were: A specific item in line 13 of the page for January 13 (R. 56, 57-58); the fact that the totals in the book were identical with the totals on petitioners' income tax return for 1947 (R. 56); and the fact that the book, though originally printed for use in 1946, had been altered for use in 1947 (R. 58).

books. (R. 111.) When he entered, petitioner's attorney, Lambert, was waiting in the reception room, and petitioner asked Lambert whether it would be all right to let the book go out of the office. (R. 111-112.) The book (Govt. Ex. 4) was then surrendered to the agent (R. 112). Petitioner stated repeatedly that this was his only account book for 1947 and that it reflected his true income for that year. At no time did he claim that it was only a copy, or that it had been made up from memory after the original had been stolen. (R. 112-113, 117.)

By stipulation Government's Exhibit 5 (R. 227-229) was received in evidence. This is a tabulation which shows that the larger fees actually paid to petitioner by the patients who testified were recorded in his 1947 account book as payments of from $2 to $10. (R. 121-123, 125.)

Petitioner testified that the book he showed Agent Cannon on March 14, 1949, was his original 1947 account book, and that Cannon "thumbed it a little bit" and returned it (R. 131, 137); that about a week before Agent Penny's visit in December, 1949, he discovered that this original book had been stolen from his office, and he thereupon hurriedly made up a new one, relying upon memory, his 1947 income tax returns, and some daily memoranda for 1947 which he had retained (R. 135-137, 140); that when Agent Penny asked for his 1947 book he told him what had happened and warned him that the

new book was not accurate, but when Penny insisted he gave it to him on Mr. Lambert's advice (R. 135-136, 137-138). On cross-examination petitioner admitted that, during a conference with representatives of the Bureau of Internal Revenue in 1951, he had stated that the account book he gave Agent Penny in December, 1949, was the record from which he had made up his income tax return for the year 1947, that the entries in the book had been made from daily memoranda, and that the memoranda had been destroyed after the entries had been made in the account book. (R. 147-160.) Petitioner's testimony as to his conversation with Agent Penny was corroborated by his wife (R. 165-168) and, to a certain extent, by one of his patients (R. 172-179).

Agent Penny denied in rebuttal that petitioner had ever told him that the original record had been lost and that the book given him had been made up. (R. 186.)

ARGUMENT

1. Petitioner contends (Pet. 7, 8, 11-13) that the trial court committed prejudicial error in permitting the prosecutor to refer in argument to his "past reputation." He argues that this reference called the attention of the jury to the fact that he had produced no testimony as to his "character and reputation," thus depriving him of his right to rely upon an alleged presumption of good "character and reputation."

The portion of the prosecutor's argument referred to, which followed defense counsel's reference to defendant as an "honest" man (R. 203), reads as follows (R. 215):

> Now, let us talk about the Doctor's past reputation.
>
> Mr. Peterson [defense counsel]: There is no evidence of that, Your Honor.
>
> Mr. Openlander [Government counsel]: I don't believe you understand what I am going to say. Every time a man comes into this court there is talk about the fact that he was an honest member of the community. I will say to you that more in income tax fraud cases than in any others,—
>
> Mr. Peterson: (Interposing) I object.
>
> The Court: He hasn't touched upon it yet. If he does, I will stop him.
>
> Mr. Openlander: I won't, Your Honor. This Doctor stands in the same position as anyone else. He has come in here, and he is accused of a crime, an offense. They come in here and appeal to your sympathy and say this man was an honest man.

The prosecutor then concluded his argument by pointing out that there was no conceivable reason why the agents should have lied, and that all the evidence pointed definitely to guilt.

In the first place, there is no presumption of good "character and reputation," as asserted by

petitioner. *Greer* v. *United States*, 245 U. S. 559; cf. *Michelson* v. *United States*, 335 U. S. 469, 475. There is, of course, a presumption of innocence in respect of the particular offense charged. The "character" of a defendant, i.e., what sort of man he actually is, is not ordinarily in issue in a criminal case, except to the limited extent to which he opens the issue himself by offering evidence of a good "reputation," i.e., what people in general say about what sort of man he is. *Michelson* v. *United States, supra*, pp. 475-477. It is quite true that, as petitioner says, the prosecutor may not call attention to the fact that the defendant has failed to offer witnesses as to his general "reputation." But it is another thing to say that, after defense counsel has stated to the jury that the defendant is an "honest" man (R. 203), the prosecutor may not comment on such statements.

In this case the prosecutor was not, in the cited passage, calling the jury's attention to any omissions in the case presented by petitioner. He was endeavoring to counteract the positive efforts of the defense to depict petitioner as a man of honest and upright character.[3] Petitioner had testified that he had been practicing medicine since 1914 (R. 129); that he served in the Medical Department of the Army during the first World War (R.

[3] The prosecutor would have been technically more accurate if he had used the term "character" instead of "past reputation." But he was rebutting an argument in which one of petitioner's counsel had referred to the "reputation" of petitioner and his wife. (R. 202.)

130); that he had practiced in the same neighborhood in Toledo ever since (R. 130); that he did a great deal of work for high school athletes free of charge (R. 138); and that he belonged to two medical associations (R. 139). Defense counsel put stress on this testimony in arguing the case to the jury (R. 201), and one of the aims of their argument was to picture petitioner as an honest man who had endeavored to be fair with the Government, whereas the Government agents were persecuting him and ruining his reputation (R. 200-210). The prosecutor had, throughout the trial, been careful to avoid the use of any language which would have implied that there was anything improper in the medical practice conducted by petitioner. But when defense counsel endeavored to depict him to the jury as a man whose inherent honesty would not permit him to submit a false statement, it was certainly proper for the prosecutor to point out in reply that the evidence in this case permitted a contrary inference. *Ochoa* v. *United States,* 167 F. 2d 341, 344 (C.A. 9th); *Springer* v. *United States,* 148 F. 2d 411, 414 (C.A. 9th); *United States* v. *Wernecke,* 138 F. 2d 561, 565 (C.A. 7th), certiorari denied, 321 U.S. 771; *Baker* v. *United States,* 115 F. 2d 533, 543-544 (C.A. 8th), certiorari denied, 312 U. S. 692; *United States* v. *DeVasto,* 52 F. 2d 26, 30 (C.A. 2d), certiorari denied, 284 U. S. 678.

2. Petitioner contends (Pet. 7, 9, 13-15) that the trial court erred in not giving a specific requested instruction requiring the jury to find that the account book produced at the trial (Govt. Ex. 4) was the identical one furnished to the agents by petitioner. No such specific request was presented to the trial judge in writing at the close of the evidence, as provided in Rule 30, Federal Rules of Criminal Procedure, *supra*, pp. 4-5. At the conclusion of the charge to the jury defense counsel did make an oral request of this nature (R. 225), but he did not object when the trial judge stated that he had already made the matter clear and did not want to emphasize it further. A glance at a few pages (R. 219-222) of the district court's careful and thorough instruction will suffice to show that the point had been made perfectly plain, and that the present contention is entirely without merit.

3. Petitioner contends (Pet. 7, 9, 16) that the trial court erred in refusing to give a specific requested instruction to the effect that the indictment is not evidence of guilt. In refusing this request (R. 189) the trial judge said that he would cover the matter in substance in the general charge. It is clear that this was done. The court said (R. 216-217, 219):

> The fact that an indictment was returned against this defendant does not raise a presumption of guilt against him. * * * Therefore,

> you will understand that the defendant is presumed to be innocent irrespective of the fact that an indictment was returned against him, * * *
>
> * * * * *
>
> You are further instructed that neither the indictment, the opening statements of counsel, nor the arguments of counsel are evidence in the case, and none of these are to be considered by you * * * . * * *

4. Petitioner contends (Pet. 8, 9-10, 16-20) that the stipulation of fact offered by his counsel at the outset of the trial should have been accepted. Petitioner states (Pet. 3) that he offered to stipulate that Government's Exhibit 4 contained numerous inaccurate and incorrect statements, in order to prevent a parade of women witnesses. But he also wanted the Government to stipulate that when he handed the book to the agents he told them that the original had been stolen and that this was an inaccurate reproduction (*supra,* p. 6). Obviously, the Government could not agree to this. The prosecutor offered petitioner an opportunity to keep the women off the stand by indicating his willingness to stipulate as to their testimony. But defense counsel, after conferring briefly, informed the court that no agreement could be reached. (R. 52-53.) In these circumstances, if the jury drew any inference as to the nature of petitioner's practice

from the number of women witnesses, the responsibility rests solely upon petitioner and his counsel.

5. Petitioner contends (Pet. 5, 8, 10, 20-22) that the facts alleged in the indictment did not constitute a felony under 18 U.S.C. 1001, and that if any offense was stated it was only a misdemeanor under Section 3616 of the Internal Revenue Code. He argues that 18 U.S.C. 1001 is a general statute covering false statements, but that Section 3616 is controlling here because it relates specifically to such statements in income tax cases. That argument is without merit.

The indictment charged that petitioner knowingly submitted false records to agents of the Bureau of Internal Revenue who were duly engaged in an investigation of his income tax returns. (R. 3.) 18 U.S.C. 1001 (*supra*, p. 3) makes it a felony knowingly to submit a false statement in a matter within the jurisdiction of any agency of the United States. Clearly, the facts alleged in the indictment state an offense under this statute, unless the statute has no application to frauds involving the revenue.

On the other hand, Section 3616 of the Internal Revenue Code (*supra*, pp. 3-4) is quite narrow in its scope. The statute makes it a misdemeanor to submit a false statement "to the collector or deputy * * * with intent to defeat or evade the valuation, enumeration, or assessment intended to be made." Three elements of this statutory offense

were not alleged in the present indictment. The indictment did not charge that the false records had been submitted to a collector or deputy collector, but to internal revenue agents.[4] It did not charge that any valuation, assessment or enumeration was being made. And it did not charge an intent to evade or defeat any such assessment. The indictment did not, therefore, allege an offense under Section 3616. And if petitioner were correct in his contention that Section 3616 has supplanted 18 U.S.C. 1001 in tax fraud cases, then the indictment would state no offense at all.

The argument now raised by petitioner was rejected in *Ex parte Berkoff,* 65 F. Supp. 976, 979-980 (D. Minn.), affirmed *sub nom. Berkoff* v. *Humphrey,* 159 F. 2d 5 (C.A. 8th). And a slight variant has recently been found without merit by the Court of Appeals for the Ninth Circuit in *Cohen* v. *United States,* decided January 6, 1953 (1953 C.C.H., par. 9165).[5]

---

[4] The Internal Revenue Code, as originally enacted, drew a careful distinction between collectors who were appointed by the President and who in turn appointed their deputies, and internal revenue agents, who were appointed by the Commissioner of Internal Revenue. See Internal Revenue Code, Sections 3940-4003. This distinction has been altered to some extent by Reorganization Plan No. 1 of 1952, effective March 15, 1952, 17 Fed. Reg. 2243.

[5] Cohen had raised exactly the same argument as petitioner, without success, in his attempts to be released on bond pending appeal. See *Ex parte Cohen,* 191 F. 2d 300 (C.A. 9th), and *Cohen* v. *United States,* 192 F. 2d 933 (C.A. 9th), certiorari denied, 342 U. S. 947.

Moreover, even if there be some overlapping of the two statutes, it would be no defense to a prosecution under 18 U.S.C. 1001 that the allegations and proof could also sustain a conviction under some other specific statutory provision making it a crime to defraud or deceive particular Government agencies or officials. *United States* v. *Tommasello,* 160 F. 2d 348, 350-351 (C.A. 2d); *United States* v. *Heine,* 149 F. 2d 485, 487 (C.A. 2d), certiorari denied, 325 U. S. 885. The general criminal statutes have been resorted to from time to time in internal revenue prosecutions in place of, or in addition to, the various penalty provisions of the Internal Revenue Code. *United States* v. *Noveck,* 273 U. S. 202; *Gaunt* v. *United States,* 184 F. 2d 284 (C.A. 1st); *Capone* v. *United States,* 51 F. 2d 609 (C.A. 7th), certiorari denied, 284 U. S. 669. See also *United States* v. *Beacon Brass Co.,* 344 U. S. 43, 46; *United States* v. *Gilliland,* 312 U. S. 86, 95-96; *United States* v. *Borden Co.,* 308 U. S. 188, 198.

CONCLUSION

The decision below is clearly correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
MEYER ROTHWACKS,
JOSEPH M. HOWARD,

Special Assistants to the Attorney General.

MARCH, 1953.

☆U.S. GOVERNMENT PRINTING OFFICE 1953—245295/P.O. 1283